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Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 92.

ADAMS EXPRESS COMPANY, *Plaintiff in Error*,

vs.

THE STATE OF IOWA.

In Error to the Supreme Court of the State of Iowa.

BRIEF FOR THE PLAINTIFF IN ERROR.

INTERSTATE TRANSPORTATION OF LIQUOR C. O. D.

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THE STATE OF IOWA.

In Error to the Supreme Court of the State of Iowa.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This was an indictment against the Adams Express Company in the district court of Madison county, Iowa, for maintaining a nuisance, in violation of section 2384 of the code of Iowa. The indictment charged in substance that the Adams Express Company, between July and December, 1900, at St. Charles, Madison county, Iowa, used a building for the purpose of selling intoxicating liquors therein, contrary to law, and that it owned and kept therein intoxicating liquor with the intent unlawfully to sell the same within the state contrary to the statute. Rec. 1.

There was a plea of not guilty, a verdict of guilty, and a judgment imposing a fine of $350.00 and costs.

The case was appealed to the Supreme Court of Iowa on an agreed abstract of record and statement of facts, from which it appears that the Adams Express Company is a common carrier engaged in the express business between the states of Missouri and Iowa; that the liquor in controversy was contained in packages which were delivered to it at St. Joseph, Missouri, to be carried to St. Charles, Iowa, and there delivered to the consignees whose names were marked upon the packages; that each and all of the packages were marked C. O. D., meaning that they were not to be delivered by the express company to the consignees until the purchase price of the different packages and the express charges were paid to the agent of the express company, who was to return the same to the consignors at St. Joseph, Missouri; that the liquor was shipped by John Collum & Co., the consignors, on a written order signed by their agent at Osceola, Iowa, and received by them at St. Joseph, Missouri; "and that the only connection of the Adams Express Company with the transaction or transactions in relation to said liquors was as a common carrier, having received the same for carriage to the consignees at St. Charles, Iowa, to be there delivered to the consignees upon payment of the C. O. D. charges and the express charges to the agent of defendant." Rec. 4.

The court charged the jury, among other things, as follows:

"You are further instructed that if you find from the evidence beyond a reasonable doubt that it [the defendant] received and kept at its office building in St. Charles, Madison county, Iowa, packages of intoxicating liquor, carried by it from other points as a common carrier, that said packages of liquor were marked C. O. D., and the price of said liquors marked thereon, and you further find from the evidence beyond a reasonable doubt, that the liquors so kept and held by it with intent to deliver same at said place to the party to whom it was consigned upon the payment and collection

of the purchase price of the said intoxicating liquors, then and in that event, you are instructed that such delivery and collection of said purchase price of said intoxicating liquor would constitute a sale of said liquor at the place of its delivery and the collection of the purchase price thereof, and if you shall find from the evidence beyond a reasonable doubt, that intoxicating liquors were kept and held by the defendant at its office in St. Charles, Madison county, Iowa, for delivery at said place on the payment of the purchase price thereof, and that said acts were committed by the defendant within three years next prior to the 7th day of December, 1900, then the defendant is guilty of the crime of nuisance as charged in the indictment." Rec. 6.

In view of the agreed statement of facts this direction of the trial court amounted to a charge that the defendant was guilty of an offense under the laws of Iowa, because as a common carrier, it had carried intoxicating liquor C. O. D. from St. Joseph, Missouri, to St. Charles, Iowa, and held the same at the latter point for delivery to the consignees upon payment of the C. O. D. charges. It appears that the liquor was contained in closed boxes (Rec. 3). There was no evidence that the carrier knew the contents of the boxes, or that the liquor was not for the personal use of the consignees.

The Supreme Court of Iowa affirmed the conviction on the authority of State vs. American Express Company, 118 Iowa, 447; 92 N. W. 66, and Latta vs. United States Express Company, 92 N. W. 68. Rec. 9.

The decision in State vs. American Express Company, 118 Iowa, 447, which has also been brought to this court, and is to be heard with the present case, is thus stated in the syllabus:

"Where liquor is shipped by express into this state C. O. D., to be delivered to the consignee on payment of the purchase price, the express company becomes the agent of the consignor for effecting an illegal sale in this state, and such liquors are subject to seizure and may be legally destroyed."

The court in the opinion said:

"If the question were res integra in this state, a majority of the court, as now constituted, would be inclined to the view that under such a shipment the carrier is the agent of the buyer for the purposes of transportation, and of the seller for the purpose of retention of possession and collection of the purchase price, and that, as a necessary corollary, title passed to the buyer on delivery to the carrier. But the question is foreclosed in State vs. United States Express Company, 70 Iowa, 271, 30 N. W. 568, wherein it is said: 'They (the liquors) were carried by the express company, and held by it for delivery to the parties on payment of the purchase price. They were therefore the property of the consignors, and the express company was the agent of the consignors, with authority to transfer the title to the property upon payment of the purchase price. The property was therefore contraband,' etc. It was also held in that case that want of knowledge on the part of the express company of the character of the goods was entirely immaterial."

After declaring that they felt constrained to adhere to their decision made in 1886, in State vs. United States Express Company, 70 Iowa, 271, "on the broad ground of stare decisis, which is one of the safe guards of our judicial system," the court thus disposed of the federal question:

"This conclusion relieves us from the necessity of considering the other question, as to whether or not the goods are protected by reason of the commerce clause of the federal constitution. See the O'Neil case, 144 U. S. 323. However, some of the members of the court would reach the same result, had it been found that the title to the property passed when delivered to the carrier in the state of Illinois. Conceding that to be true, they are of opinion that the transaction was not in any fair sense interstate commerce, protected by the constitution of the United States from state regulation. The express company in effect engaged in the business of selling through agents in this state, at retail, intoxicating liquors, shipped by it for that purpose from the state of Illinois. This was a mere device, as it seems to some of us, to

evade the police laws of this commonwealth, and the doctrine of original packages or of freedom of interstate commerce does not apply to a business of this character. In assuming to collect the purchase price, and to hold possession until the price was paid, it was in no proper sense engaged in interstate commerce. Others of the court are of a contrary opinion. They think that the collection of the purchase price was a mere incident to the transportation of the goods, and that the case should be ruled by Rhodes vs. Iowa, 170 U. S. 412, in the event we were constrained to overrule the Express Company case in 70 Iowa, 271; 30 N. W. None of us, as before observed, are disposed to question that decision at this time, and it follows that the judgment of the district court should be and it is, reversed."

Section 2384 of the code of Iowa, under which the Adams Express Company was convicted, and its cognate sections, are as follows: (Annotated Code of Iowa, 1897, Chap. 6, Tit. XII, p. 818, as amended April 6, 1900, Laws of Iowa, 28 G. A. 1900, p. 59.)

Sec. 2382. "No one by himself, clerk, servant, employee or agent shall, for himself, or any person else, directly or indirectly, or upon any pretense or by any device, manufacture, sell, exchange, barter, dispense, give in consideration of the purchase of any property or of any services or in evasion of the statute, or keep for sale any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor whatever, except as provided in this chapter, or solicit, take, or accept any order for the purchase, sale, shipment or delivery of any such liquor, or aid in the delivery and distribution of any intoxicating liquor so ordered or shipped, or own, keep, or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquor with intent to violate any provision of this chapter, or authorize or permit the same to be done; and any clerk, servant, employee or agent engaged or aiding in any violation of this chapter shall be charged and convicted as principal, provided that nothing herein shall prohibit traveling salesmen soliciting orders for the purchase, sale, and shipment of intoxicat-

ing liquors from persons legally authorized to sell or dispense the same."

Sec. 2383. "Whoever is found guilty of violating any of the provisions of the preceding section, for the first offense shall pay a fine of not less than fifty nor more than one hundred dollars, and costs of prosecution, and stand committed to the county jail until such fine and costs are paid; for the second and each subsequent offense he shall pay upon conviction thereof a fine of not less than three hundred dollars nor more than five hundred dollars, and costs of prosecution, or be imprisoned in the county jail not to exceed six months."

Sec. 2384. "Whoever shall erect, establish, continue or use any building, erection or place for any of the purposes herein prohibited, is guilty of a nuisance, and upon conviction shall pay a fine of not less than three hundred nor more than one thousand dollars and costs of prosecution, which shall include a reasonable attorney's fee to be taxed by the court, and stand committed to the county jail until such fine and costs are paid, and the building, erection or place, or the ground itself, in or upon which such unlawful manufacture, or sale, or keeping with intent to sell, use or give away said liquors is carried on or continued or exists, and the furniture, fixtures, vessels and contents are also declared a nuisance, and in addition to the penalties hereinbefore affixed, shall be abated as hereinafter provided."

Assignment of Errors.

The plaintiff in error submits that the transaction, on account of which it was prosecuted and convicted in the state court, constituted interstate commerce, and was not subject to regulation by the state of Iowa, and that the statute under which it was convicted, in its application to the admitted facts of the case, is in conflict with the commerce clause of the constitution of the United States. This federal question is presented by the ninth, tenth and eleventh assignments of error filed by the plaintiff in error in the Supreme Court of Iowa (Rec. 8, 9), and by its assignment of errors in this court. Rec. 10.

ARGUMENT.

I.

The Iowa Statute, as construed by its Supreme Court, is repugnant to the constitution and laws of the United States, unless it is authorized by the Wilson Act.

This proposition is settled by the cases of Bowman vs. Chicago & Northwestern Railway Company, 125 U. S. 465 (1888) and Leisy vs. Hardin, 135 U. S. 100 (1890).

In Bowman's case the court held that a statute of Iowa forbidding common carriers to bring intoxicating liquors into the state from any other state or territory without first being furnished with a certificate as prescribed, was invalid, because essentially a regulation of commerce among the states. In delivering the opinion Mr. Justice Matthews said:

"It can not be doubted that the law of Iowa now under examination, regarded as a rule for the transportation of merchandise, operates as a regulation of commerce among the states." 125 U. S. 479.

After quoting a passage from the opinion in County of Mobile vs. Kimball, 102 U. S. 691, in which Mr. Justice Field declared that "there can be only one system of rules applicable alike to the whole country" for the regulation of commerce as defined by this court, and "that the authority which can act for the whole country can alone adopt such a system" and that "action upon it by separate states is not therefore permissible," Mr. Justice Matthews said:

"The principle thus announced has a more obvious application to the circumstances of such a case as the present, when it is considered that the law of the state of Iowa under consideration, while it professes to regulate the conduct of carriers engaged in transportation within the limits of that state, nevertheless materially affects, if allowed to operate, the conduct of such carriers, both as respects their rights and

obligations, in every other state into or through which they pass in the prosecution of their business of interstate transportation. In the present case, the defendant is sued as a common carrier in the state of Illinois, and the breach of duty alleged against it is a violation of the law of that state in refusing to receive and transport goods which, as a common carrier, by that law, it is bound to accept and carry. It interposes as a defence a law of the state of Iowa, which forbids the delivery of such goods within that state. Has the law of Iowa any extra territorial force which does not belong to the law of the state of Illinois? If the law of Iowa forbids the delivery, and the law of Illinois requires the transportation, which of the two shall prevail? How can the former make void the latter?" 125 U. S. 486.

The doctrine established in Bowman's case is thus stated by Mr. Justice White in Rhodes vs. Iowa, 170 U. S. 412, 415:

"After great consideration it was held that the law of the state of Iowa, in so far as it affected interstate commerce, was repugnant to the interstate commerce clause of the constitution, and was void. It was decided that the transportation of merchandise from one state into and across another was interstate commerce, and was protected from the operation of state laws from the moment of shipment whilst in transit and up to the ending of the journey by the delivery of the goods to the consignee at the place to which they were consigned."

II.

The Wilson Act does not allow the State of Iowa to prevent the delivery of liquor shipped from another state. Its power under the Wilson Act does not attach until the interstate transportation has been completed by delivery to the consignee in Iowa.

This is settled by the case of Rhodes vs. Iowa, 170 U. S. 412.

The act of Congress approved August 8, 1890, c. 728, 26 Stat. 313, commonly known as the Wilson Act, is as follows:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

In re Rahrer, 140 U. S. 545, the court held that under the Wilson act the state of Iowa might forbid the sale of intoxicating liquor shipped from another state, after the act of transportation had been completed by delivery to the consignee in Iowa, but in Rhodes vs. Iowa, 170 U. S. 412, the court held that the Wilson act "was not intended to and did not cause the power of the state to attach to an interstate commerce shipment whilst the merchandise was in transit under such shipment, and until the arrival at the point of destination and delivery there to the consignee," 170 U. S. 426. The contention sustained by the court was "that the act of Congress in no way provides that the laws of Iowa should apply before the consummation by delivery of the interstate commerce transaction," 170 U. S. 420.

The court held "that as the act for which the plaintiff in error [Rhodes] was convicted, and which consisted in moving the goods from the platform to the freight warehouse, was a part of the interstate commerce transportation, and was done before the law of Iowa could constitutionally attach to the goods, the conviction was erroneous, and the judgment below was therefore reversed," 170 U. S. 426.

In Vance vs. W. A. Vandercook Company (No. 1), 170 U. S. 438, 444, Mr. Justice White said:

"Equally well established is the proposition that the right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation

whereof has been committed by the Constitution of the United States to Congress, and, hence, that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States."

And at p. 451:

"The interstate commerce clause of the Constitution guarantees the right to ship merchandise from one state into another, and protects it until the termination of the shipment by delivery at the place of consignment, and this right is wholly unaffected by the act of Congress which allows state authority to attach to the original package before sale but only after delivery. Scott vs. Donald, 165 U. S. 58, 107; Rhodes vs. Iowa, 170 U. S. 412. It follows that under the Constitution of the United States every resident of South Carolina is free to receive for his own use liquor from other states, and that the inhibitions of a state statute do not operate to prevent liquors from other states from being shipped into such state, on the order of a resident for his use."

In State vs. Hanaphy, 117 Iowa 15, 20, the Supreme Court of Iowa thus refers to the Wilson act and to the decision of this court in Rhodes vs. Iowa:

"This statute has been made practically ineffective as a restriction of importation of liquors by the interpretation placed upon it in Rhodes vs. Iowa, 170 U. S. 412. It is there held that the words 'upon their arrival within the state' apply only to the time when the liquors have reached their appointed destination and are delivered to the consignee, and that the only practical operation of this act is to permit the state to prohibit the sale by the consignee." 117 Iowa, 20.

III.

The principle determined in Rhodes vs. Iowa rules this case.

The judges of the Supreme Court of Iowa were not agreed as to the grounds on which the case of the American Express Company, 118 Iowa, 447, could be distinguished from

Rhodes vs. Iowa. A majority were "inclined to the view that under such a shipment [C. O. D.] the carrier is the agent of the buyer for the purposes of transportation, and of the seller for the purpose of retention of possession and collection of the purchase price, and that, as a necessary corollary, title passed to the buyer on delivery to the carrier," but they considered the question foreclosed by the decision of the court in State vs. United States Express Company, 70 Iowa, 271 (1886), and that they were bound by the rule of stare decisis. It was evidently this majority who, if they had felt at liberty to overrule State vs. United States Express Company, would have held "that the collection of the purchase price was a mere incident to the transportation of the goods, and that the case should be ruled by Rhodes vs. Iowa." 118 Iowa, 452.

The opinion states that "some of the members of the court would reach the same result, had it been found that the title to the property passed when delivered to the carrier in the state of Illinois. Conceding that to be true, they are of opinion that the transaction was not in any fair sense interstate commerce, protected by the constitution of the United States from state regulation. The Express Company in effect engaged in the business of selling through agents in this state, at retail, intoxicating liquors shipped by it for that purpose from the state of Illinois. This was a mere device, as it seems to some of us, to evade the police laws of this commonwealth, and that the doctrine of 'original packages' or of freedom of interstate commerce does not apply to a business of this character. In assuming to collect the purchase price, and to hold possession until the price was paid, it was in no proper sense engaged in interstate commerce," p. 451, 452.

The foregoing view of the minority, that the express company must be held to be engaged in the business of selling

liquor at retail in Iowa, even if it be conceded that the title passed in Illinois, seems to be illogical. Their statement that this was a mere device to evade the police laws of the state, seems to ignore the admission that the company was ignorant of the contents of the packages.

It is evident that a majority of the court were of opinion that title passed to the consignee on delivery of the package to the express company in Illinois, and that the agreement of the company to collect the C. O. D. charges was a lawful incident to the transportation of the goods. A contrary conclusion was reached only in deference to the earlier case of State vs. United States Express Company, 70 Iowa, 271, the judges comforting themselves with the reflection "that the doctrine announced, while not supported perhaps by the weight of judicial authority, is one which will do much good, and no harm," p. 451. But in this court, the question whether title passed in Missouri or Iowa, if that determines whether the transaction was interstate commerce, or a sale in Iowa, must be settled on principle.

IV.

The Express Company did not sell the liquor. It acted only as a common carrier to deliver, on certain conditions, liquor already sold.

The contract of sale was complete when the sellers accepted the order and selected and set aside the particular liquor intended for the buyer, and delivered it in Missouri to the express company, boxed and addressed to the buyer, for delivery to him in Iowa. On principle and according to the decided weight of authority, not only was the contract of sale complete at that time, but the title passed to the buyer. We do not however consider the latter proposition as controlling. The question is not when title passed, but whether the express company, in agreeing to receive and carry and

deliver the liquor, was acting as a common carrier engaged in interstate transportation, and protected as such by the Constitution of the United States, or whether it was engaged in the business of selling liquor in Iowa. The latter proposition can not be affirmed in the face of the admission that the terms of sale had already been settled by the parties and that the express company had no connection with the transaction except as a common carrier. See agreed statement of facts, Rec. 4.

In Norfolk & Western Railway Company vs. Sims, 191 U. S. 441, 447, Mr. Justice Brown said:

"A sale really consists of two separate and distinct elements: first, a contract of sale, which is completed when the offer is made and accepted; and, second, a delivery of the property, which may precede, be accompanied by, or follow the payment of the price, as may have been agreed upon between the parties. The substance of the sale is the agreement to sell and its acceptance. That possession shall be retained, until the payment of the price, may or may not have been a part of the original bargain, but in substance it is a mere method of collection."

In Commonwealth vs. Russell, 11 Ky. L. R. 576, the Court of Appeals of Kentucky said:

"The fact that the price was to be paid to the carrier before he was authorized to deliver to the purchaser, no more affects the question as to when and where the sale was made than if the goods had been sent without such directions, and the seller had relied upon some other mode of collecting the price. The sale is in either case absolute. The only difference is that in one case a lien is retained, and in the other it is not."

In United States vs. Lackey, 120 Fed. 577, 578, 579, McDowell, D. J., said:

"An order for goods to be shipped 'collect on delivery,' makes payment a condition precedent to or concurrent with delivery to the purchaser, but it does not necessarily make

payment a condition precedent to the transfer of title. In such cases, there being nothing to show the intention other than the mere order to ship a certain article 'collect on delivery,' it seems to me that when the seller has segregated the article, packed it, addressed the package to the consignee, and delivered it to the carrier, he has done all that the contract implied that he should do. The title then vested in the purchaser, subject to be defeated on breach of the condition subsequent that the vendee pay the purchase price on delivery to him."

In Commonwealth vs. Fleming, 130 Pa. St. 138, the plaintiff in error, Fleming, being a wholesale liquor dealer, licensed and carrying on business in Allegheny county, sent from his place of business C. O. D. to Mercer county, where he had no license, liquor ordered by persons in the latter county. For this, at the court of quarter sessions of Mercer county, he was indicted, tried, convicted, and sentenced for selling liquor therein without a license. The conviction was reversed by the supreme court. Green, J., delivering the opinion said:

"It is claimed and was so held by the court below, that, because the goods were marked C. O. D., the sale was not complete until the delivery was made; and as that took place in Mercer county, where the defendant's license was inoperative, he was without license as to such sales, and became subject to the penalty of the criminal law. . . . The direction embodied in the letters C. O. D., placed upon a package committed to a carrier, is an order to the carrier to collect the money for the package at the time of its delivery. It is a part of the undertaking of the carrier with the consignor, a violation of which imposes upon the carrier the obligation to pay the price of the article delivered, to the consignor. We have been referred to no authority, and have been unable to discover any, for the proposition that in such a case, after actual, absolute delivery to the purchaser by the carrier without payment of the price, the seller could reclaim the goods from the purchaser as upon violation of a condition precedent.

"If, now, we pause to consider the actual contract relation between the seller and purchaser, where the purchaser orders the goods to be sent to him C. O. D., the matter becomes still more clear. Upon such an order, if it is accepted by the seller, it becomes the duty of the seller to deliver the goods to the carrier, with instruction to the carrier to collect the price at the time of delivery to the purchaser. In such a case it is the duty of the purchaser to receive the goods from the carrier, and, at the time of receiving them, to pay the price to the carrier. This is the whole of the contract, so far as the seller and the purchaser are concerned. It is at once apparent that when the seller has delivered the goods to the carrier, with the instruction to collect the price on delivery to the purchaser, he has performed his whole duty under the contract; he has nothing more to do. If the purchaser fail to perform his part of the contract, the seller's right of action is complete; and he may recover the price of the goods from the purchaser, whether the purchaser takes or refuses to take the goods from the carrier. Hence it follows that the passage of the title to the purchaser is not essential to the legal completeness of the contract of sale. It is, in fact, no more than the ordinary case of a contract of sale, wherein the seller tenders delivery at the time and place of delivery agreed upon, but the purchaser refuses performance. In such case it is perfectly familiar law that the purchaser is legally liable to pay the price of the goods, although, in point of fact, he has never had them.

"The order to pay on delivery is merely a superadded term of the contract; but it is a term to be performed by the purchaser, and has no other effect upon the contract than any other term affecting the factum of delivery. It must be performed by the purchaser, just as the obligation to receive the goods at a particular time or a particular place. Its nonperformance is a breach by the purchaser, and not by the seller, and therefore can not affect the right of the seller to regard the contract of sale as complete, and completely performed on his part, without any regard to the question whether the title to the goods has passed to the purchaser as upon an actual reception of the goods by him. If this be so, the case of the Commonwealth falls to the ground, even upon the

most critical consideration of the contract between the parties, regarded as a contract for civil purposes only. The duties which lie intermediate between those of the seller and those of the purchaser are those only which pertain to, and are to be performed by, the carrier. These, as we have before seen, are the ordinary duties of carriage and delivery, with the additional duty of receiving the price from the purchaser, and transmitting it to the seller."

The opinion then states the case of Higgins vs. Murray, 73 N. Y. 252, saying of it:

"Practically, it was ruled that the effect of the order C. O. D. was simply the retention of the seller's lien, and that such retention of lien is not inconsistent with a right of recovery for the price of the article, though, in point of fact, it is not delivered to the purchaser. In other words, the literal state of the title is not decisive of the question of liability of the purchaser, and he may be compelled to pay for the article, though he never received it into his actual possession. The chief justice propounds the very question suggested, heretofore, of a refusal by the purchaser to accept the article, and holds that his liability would be the same, though the title was not in him."

"In Hutchinson on Carriers, at section 389, the writer thus states the position and duty of the carrier: 'The carrier who accepts the goods with such instructions (C. O. D.) undertakes that they shall not be delivered unless the condition of payment be complied with, and becomes the agent of the shipper of the goods to receive such payment. He therefore undertakes in addition to his duties as carrier, to collect for the consignor the price of his goods.' And again, in section 390: 'When the goods are so received, the carrier is held to a strict compliance with such instructions, and, if the goods are delivered without an exaction from the consignee of the amount which the carrier is instructed to collect, he becomes liable to the consignor for it.' This is certainly a correct statement of the position and liability of the carrier. He becomes subject to an added duty, that of collection; and if he fails to perform it, he is liable to the seller for the price of the goods. We have searched in vain for any text-writer's

statement, or any decision, to the effect that in such case no title passes to the purchaser. We feel well assured none such can be found. But, if this be so, the whole theory that the title does not pass if the money is not paid falls, and the true legal status of the parties results that the seller has a remedy for the price of his goods against the carrier. In other words, an order from the seller to a carrier to collect on delivery, accepted by the carrier, creates a contract between the seller and the carrier, for a breach of which by the carrier the seller may recover the price from him. So far as the seller and purchaser are concerned, the latter is liable, whether he takes the goods from the carrier or not, and the order itself is a mere provision for the retention of the seller's lien. While, if the goods are not delivered to the purchaser by the carrier, the title does not pass, that circumstance does not affect the character of the transaction as a sale; and the right of the seller to recover the price from the purchaser, if he refuse to take them, is as complete as if he had taken them and not paid for them."

In State vs. Cairns, 68 Pac. 621, Cairns, who was agent of the Wells, Fargo Express Company, was convicted of selling intoxicating liquors. The Supreme Court of Kansas reversed the conviction, stating the question before it thus:

"Is the agent of an express company or other common carrier for hire, who in good faith delivers goods carried by his principal, consigned C. O. D., and collects and returns the charges thereon, guilty of selling intoxicating liquors to the party to whom delivery is made, even though he knows the goods so consigned and delivered to be intoxicating liquors."

The conclusion of the court is thus stated:

"The weight of authority supports the rule that where goods are ordered to be shipped C. O. D., the contract of sale is completed upon the vendor delivering the goods to a common carrier, although with instructions to collect the price from the consignee before delivery to him. This rule obtains where the goods sold are intoxicating liquors as in other cases."

Justice Emlin McClain, an associate justice of the Supreme Court of Iowa, who took part in the decision below, makes the following statement in his article on Carriers, published in 1903, in 6 Cyc. 476:

"By the decided weight of authority delivery C. O. D., like an ordinary delivery to a carrier, presumptively passes title to the consignee, the only difference being that the carrier is to retain possession of the goods as agent for the shipper until payment is made by the consignee, and on receiving money in payment is, as carrier for the consignor, to transport back such money. In other words, under this view, the title to the goods passes to the consignee on delivery to the carrier, but right to possession in the nature of a vendor's lien remains with the consignor while the goods are in the carrier's possession, and terminates only when the condition is performed and the money paid by the consignee to the carrier, whereupon the title to and possession of the money vests in the consignor" (citing cases).

"The doctrine has frequently been applied in cases of transportation of intoxicating liquors, and it has been held that where an order for such liquors has been accepted by the seller and the liquors delivered to the carrier for transportation C. O. D. to the buyer, the sale is made, that is the title passes, where the liquors are delivered to the carrier, and not where the carrier delivers the liquors to the buyer and accepts payment of the purchase price" (citing cases).

The following cases involved C. O. D. shipments and support that view:

Alabama—Pilgreen vs. State, 71 Ala. 368 (1882).
Arkansas—State vs. Carl, 43 Ark. 353 (1884).
Illinois—City of Carthage vs. Duvall, 202 Ill. 234 (1903).
City of Carthage vs. Munsell, 203 Ill. 474 (1903).
Breechwald vs. The People, 21 Ill. App. 213 (1886).

Frolich vs. Alexander, 36 Ill. App. 428 (1890).

Village of Coffeen vs. Huber, 78 Ill. App. 455 (1898).

Kansas—State vs. Cairns, 68 Pac. Rep. 621 (Supreme Ct) (1902).

Kentucky—Commonwealth vs. Russell, 11 Ky. L. R. 576 (1889).

James vs. Commonwealth, 102 Ky. 108; 19 Ky. L. R. 1045; 42 S. W. 1107 (1897).

Maine—State vs. Intoxicating Liquors, 73 Me. 278 (1882).

State vs. Peters, 91 Me. 31 (1897).

New York—Higgins vs. Murray, 73 N.Y. 252 (1878).

North Carolina—Norfolk & Western R. R. Co. vs. Barnes, 104 N. C. 25 (1889).

Pennsylvania—Commonwealth vs. Fleming, 130 Pa. St. 138 (1889).

Texas—Bruce vs. State, 36 Texas Crim. App. 53; 35 S. W. 383 (1896).

Freshman vs. State, 37 Texas Crim. App. 126; 38 S. W. 1007 (1897).

West Virginia—State vs. Flanagan, 38 W. Va. 53 (1893).

Wisconsin—Sarbecker vs. State, 65 Wis. 171 (1886).

Federal Cases:

U.S. vs. Adams Express Co. (Iowa) 119 Fed. 240 (1902).

U.S. vs. Lackey (W.Va.) 120 Fed. 577 (1903).

U.S. vs. Orene Parker Co. (Ky). Cochran, D. J. (1902) (unreported) Opinion printed as appendix to this brief.

V.

The agreement of the Express Company not to deliver the goods until the C. O. D. charges were paid, and to return the money to the shippers, if paid, was a mere incident of its contract to carry and deliver the goods, and does not subject it to the charge that thereby it became engaged in the business of selling liquor at retail in Iowa.

The agreement of the express company, in receiving the goods for transportation, that it would not deliver them until the C. O. D. charges were paid, and that, if the charges were paid, it would return the money to the shipper at St. Joseph, Missouri, was made in pursuance of a long established and well recognized custom of express carriers, and was a lawful incident of its business and of its contract to carry and deliver the goods. It was part of the interstate commerce transaction and does not subject the company to the charge that thereby it became engaged in the business of selling liquor in Iowa. If the state of Iowa had attempted to tax the express company or the consignors, on the theory that either was engaged in selling goods in Iowa, this court would have held the attempt to be an unlawful interference with interstate commerce.

In Caldwell vs. North Carolina, 187 U. S. 622 (1903), the court held that an ordinance passed by the board of aldermen of the city of Greensboro, North Carolina, in pursuance of powers conferred by the legislature of the state, that every person engaged in the business of selling or delivering picture frames, pictures, photographs, or likenesses of the human face in the city of Greensboro, whether an order for the same shall have been previously taken or not, shall pay a license tax of ten dollars for each year, was an attempt to interfere with, and to regulate commerce, and as such was invalid as to an agent of a corporation residing out of the state.

Mr. Justice Shiras said (page 632):

"Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, *if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation.* The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate."

In Norfolk & Western Railway Company vs. Sims, 191 U. S. 441, the court held that Sears, Roebuck & Co., manufacturers of sewing machines at Chicago, were not "engaged in the business of selling the same within the state of North Carolina," because they shipped a machine from Chicago to Roxboro, N. C., to be delivered to the purchaser there C. O. D.; that the transaction was interstate commerce, and that the seller could not be subjected to a license tax imposed in that state on persons engaged in the sale of similar articles within the state.

Mr. Justice Brown said, at p. 447:

"While it may be entirely true that the property in the thing sold does not pass under a C. O. D. consignment until delivery of the goods and payment to the carrier, and hence it may be said that the sale is not completed until then, yet as matter of fact the bargain is made and the contract of sale completed as such, when the order is received in Chicago, and the machine shipped in pursuance thereof.

A sale really consists of two separate and distinct elements: first, a contract of sale, which is completed when the offer is made and accepted; and, second, a delivery of the property

which may precede, be accompaniel by, or follow the payment of the price, as may have been agreed upon between the parties. The substance of the sale is the agreement to sell and its acceptance. That possession shall be retained until payment of the price may or may not have been a part of the original bargain, but in substance it is a mere method of collection, and we have never understood that a license could be imposed upon this transaction, except in connection with the prior agreement to sell, although in certain cases arising under the police power it has been held that the sale is not complete until delivery, and sometimes not until payment. Were it not for the opinion of the supreme court of North Carolina, we should have said that the words 'engaged in the business of selling the same within the state' had reference to the word 'selling' in its popular and ordinary sense, of selling from a stock on hand or upon a special order to a manufacturer, and not to a mere method of collecting the money; but, however this may be, it is evident the state courts could not give it a construction which would operate as an interference with interstate commerce, and that upon this question the opinion of this court is controlling."

In State vs. Hanaphy, 117 Iowa, 15 (1902), the Supreme Court of Iowa held that a traveling salesman who had taken orders in Iowa for intoxicating liquor to be shipped from Illinois to Iowa, C. O. D., was not guilty of an offense under sec. 2382 of the code of Iowa, which prohibits any person from soliciting or accepting any order for the purchase of liquors, or from aiding in the delivery or distribution thereof. The court reversed the conviction in the lower court, upon the ground that the transaction constituted interstate commerce, saying at p. 21:

"The proposition strongly urged in argument by the state, that the order being made for shipment of the liquors by express, to be paid for on delivery here, makes a sale within this state and therefore avoids the claim that it was an act of interstate commerce we think is not sound. The question whether it was an act of interstate commerce is not, we think, determined by the place where the title to the property passed

to the purchaser. It is conceded that the subject of the sale was in Illinois, and owned by a resident of that state, that the purchaser was a resident of this state, and that the order contemplated the shipment of the property from the seller in Illinois to the purchaser in Iowa. All these acts—the seeking of the customer by the agent, the soliciting and taking of the order, its transmission to the house in another state, the shipment made therein, the transportation and delivery to the purchaser in this state—all unite to make up interstate commerce."

VI.

The right to contract in Missouri for the transportation of merchandise from that State into Iowa, and incidentally to fix the terms upon which the goods shall be delivered, involves Interstate Commerce in its fundamental aspect, and can not be controlled by the State of Iowa.

Upon this subject Mr. Justice White said in Rhodes vs. Iowa, 170 U. S. 412, 424:

"Whilst it is true that the right to sell free from state interference interstate commerce merchandise was held in Leisy vs. Hardin to be an essential incident to interstate commerce, it was yet but an incident, as the contract of sale within a state in its nature was usually subject to the control of the legislative authority of the state. On the other hand, the right to contract for the transportation of merchandise from one state into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several states, since it embraced a contract which must come under the laws of more than one state. The purpose of Congress to submit the incidental power to sell to the dominion of state authority should not, without the clearest implication, be held to imply the purpose of subjecting to state laws a contract which in its very object and nature was not susceptible of such regulation even if the

constitutional right to do so existed, as to which no opinion is expressed."

And at p. 422:

"Undoubtedly the purpose of the act was to enable the laws of the several states to control the character of merchandise therein enumerated at an earlier date than would otherwise have been the case, but it is equally unquestionable that the act of Congress manifests no purpose to confer upon the states the power to give their statutes an extra territorial operation so as to subject persons and property beyond their borders to the restraints of their laws. If the act of Congress be construed as reaching the contract for interstate shipment made in another state, the necessary effect must be to give to the laws of the several states extra territorial operation, for, as held in the Bowman case, the inevitable consequence of allowing a state law to forbid interstate shipments of merchandise would be to destroy the right to contract beyond the limits of the state for such shipments. If the construction claimed be upheld, it would be in the power of each state to compel every interstate commerce train to stop before crossing its borders, and discharge its freight, lest by crossing the line it might carry within the state merchandise of the character named covered by the inhibitions of a state statute."

VII.

The Supreme Court of Iowa misconceived the decision of this court in O'Neil vs. Vermont.

In its opinion in State vs. American Express Company, the Supreme Court of Iowa said that this court in O'Neil vs. Vermont, 144 U. S. 323, "sustained not only a condemnation of liquors under precisely the same state of facts as appear in the case now before us, but also affirmed a judgment of conviction against an agent connected with the sale," 118 Iowa, 450.

This court did not affirm the judgment of the Supreme

Court of Vermont. It dismissed the writ of error for want of jurisdiction. O'Neil had been convicted in Vermont for selling there in the original package, long prior to the Wilson act, liquor which had been shipped from New York. Under the decision in Leisy vs. Hardin, his conviction was erroneous and would have been reversed by this court if the federal question had been raised in the state court. His writ of error was dismissed by this court for want of jurisdiction, upon the sole ground that no question under the commerce clause of the Constitution had been presented by him to the courts of Vermont, or had been considered by the supreme court of that state. Mr. Justice Blatchford in delivering the opinion said, at p. 334:

"It is contended for the state of Vermont that this court has no jurisdiction of this case, because the record does not present a federal question. We are of opinion that this contention is correct, and that the writ of error must be dismissed for want of jurisdiction in this court.

No point on the commerce clause of the constitution of the United States was taken in the county court in regard to the present case, or considered by the Supreme Court of Vermont. One reason for this may have been that the decision in Peirce vs. New Hampshire, 5 How. 504, had not theretofore been in terms overruled or questioned by this court, the cases of Bowman vs. Chicago, etc., Railway Co., 125 U. S. 465, and Leisy vs. Hardin, 135 U. S. 100, not having been then decided. The only points raised in the county court, according to the exceptions, were, that the facts set forth in the written admission of O'Neil did not constitute an offense against the statute of Vermont under the complaint, and that he ought to be found not guilty under the facts so set forth. The matters thus excepted were too general to call the attention of the state court to the commerce clause of the Constitution, or to any right claimed under it. Farney vs. Towle, 1 Black, 350, Day vs. Gallup, 2 Wall. 97; Edwards vs. Elliott, 21 Wall. 532; Warfield vs. Chaffe, 91 U. S. 690; Susquehanna Boom Co. vs. West Branch Boom Co., 110 U. S. 57; Clark vs. Pennsylvania, 128 U. S. 395."

He closed the opinion with the following statement:

"Moreover, under the practice in the Supreme Court of Vermont, the very error relied upon must appear affirmatively in the exceptions. Sequin vs. Peterson, 45 Vermont, 255; State vs. Preston, 48 Vermont, 12; Hathaway vs. National Life Insurance Co., 48 Vermont, 335; State vs. Brunelle, 57 Vermont, 580; Spaulding vs. Warner, 57 Vermont, 654; Rowell vs. Fuller, 59 Vermont, 688.

The result is that the writ of error must be dismissed."

The dissenting justices insisted that the federal question had been properly raised in the state court. Mr. Justice Field, dissenting, said:

"It is not necessary, to give this court jurisdiction to review the judgment of that court, that the record should show that the objection that the transactions were those of interstate commerce was specifically taken in terms in the court below; it is sufficient if the facts of the record show that the question of their being transactions of that character was involved in the case, though the court below may state in various forms that it did not deem it necessary to consider it," p. 347.

Mr. Justice Harlan and Mr. Justice Brewer, dissenting, likewise insisted that the federal question had been properly raised in the state court and protested against the dismissal of the writ by this court, for want of jurisdiction, saying:

"How, then, can this court decline to consider the question, distinctly raised by O'Neil in the court below, as well as here, namely, that the transactions, on account of which he was prosecuted, constituted interstate commerce, which was not subject to regulation by the state?" p. 368.

The case is not an authority upon any question presented by the case at bar.

CONCLUSION.

John Collum & Co. had a right to sell the liquor and to ship and deliver it to the buyers, and to collect the price from them, by suit, if necessary, in the courts of Iowa. The consignees had the right to buy the liquor and to compel its delivery to them in Iowa, upon paying the purchase price, and to compel performance of the contract by suit in the courts of Iowa, if necessary. What more has been done or attempted? The right to sell and deliver the liquor involved the right to receive the price *simultaneously with its delivery*. If the liquor had been shipped by express without directions to collect on delivery and the express company had refused to deliver it, the consignees, upon tendering the price could have secured possession by judicial process. The opinion of the supreme court of Iowa seems to proceed upon the vague notion that, because the method of C. O. D. collection which the sellers have adopted to secure payment of the purchase money, facilitates sales of liquor, it is for that reason to be condemned, although it is admitted that the sales themselves are lawful and that the sellers have the legal right to insist on being paid, the moment they deliver the goods, and that the courts would lend their aid to compel the very payment which it is made an offense for the express company to assist in collecting.

The position of the express company is rendered even more anomalous. It was called upon in Missouri to carry merchandise to Iowa and directed, in the usual course of business, not to deliver it until certain money was paid. Is it obliged to employ lawyers as receiving clerks in all its offices and as drivers on all its collecting wagons throughout the United States, competent to examine and pass upon the delicate question whether title to each lot of goods offered to it for shipment C. O. D. has passed, according to the view of the supreme court of the state to which the goods are consigned?

And what is he to do if the goods are consigned to one of the thirty states whose courts have not passed on the question? It is admitted that the Adams Express Company did not know the contents of the boxes, nor whether the C. O. D. charges represented the purchase price of the goods, or a sum for which they were pledged, or money payable on some other condition. The case illustrates forcibly the principle, so often declared by this court, that contracts for interstate transportation, are not susceptible of state regulation and can not be subjected thereto, without serious embarrassment to interstate commerce and peril to those engaged in carrying it on. The plaintiff in error has been punished by the courts of Iowa for doing its duty as a common carrier, engaged in interstate commerce, and we respectfully ask that the judgment be reversed.

LAWRENCE MAXWELL, Jr.,
Counsel for the Plaintiff in Error.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF KENTUCKY.

UNITED STATES *vs.* THE ORENE PARKER CO.

OPINION.

This is an indictment against the defendant for carrying on the business of a retail liquor dealer without having paid the special tax required by law. It appears from the agreed statement of facts that on divers occasions, before the finding of the indictment, one W. H. Welsh of Johnson county, Kentucky, gave to the defendant's salesman in said county an order on defendant to ship to him at Whitehouse, in said county, by express C. O. D., one gallon of whiskey, which orders were solicited by said salesman, and which were not contracts but simply orders for the amount of whiskey called for; that said salesman sent said orders to defendant at its place of business in Covington, Kentucky; that defendant filled said orders by delivering to the express company the whiskey called for, to be delivered by it to said Welsh upon his paying the price; that thereafter the express company delivered the whiskey to Welsh at Whitehouse, Johnson county, upon his paying the price thereof; and that defendant had a United States license to sell at Covington, and not in Johnson county.

The question presented by these facts is whether what defendant did amounted to carrying on the business of a retail liquor dealer in Johnson county. And this depends to a certain extent upon the subquestion as to where the sales of whiskey, sold by defendant to said Welsh, were made, in Johnson county or at Covington. Certainly if they were made at Covington defendant did not carry on the business of a retail liquor dealer in Johnson county. But, though made in Johnson county, it is possible that it can be said that it did not carry on the business in said county. In my

opinion the sales were made at Covington. That is the place where the title to the whiskey passed from defendant to Welsh. The general rule as to when and where title to goods, shipped by the seller to the purchaser by means of a common carrier, passes, is thus stated by Judge Devens in the case of Wheelhouse vs. Parr, 141 Mass. 593.

"When goods ordered and contracted for are not directly delivered to the purchaser, but were to be sent to him by the vendor, and the vendor delivers them to the carrier, to be transported in the mode agreed on by the parties, or directed by the purchaser; or, where no agreement is made, or directions given, to be transported in the usual mode; or where the purchaser, being informed of the mode of transportation, assents to it; or where there have been previous sales of other goods, to the transportation of which in a similar manner the purchaser has not objected, the goods, when delivered to the carrier, are at the risk of the purchaser, and the property is deemed to be vested in him, subject to the vendor's right of stoppage in transitu."

As to this being the law there is no difference of opinion. What, then, is the effect of the fact that the goods so ordered by the purchaser are delivered by the seller to the carrier with directions to deliver to the purchaser upon payment of the purchase price, particularly where, as here, the order of the purchaser directs their being sent that way? Does it have the effect of preventing the title passing from the seller to the purchaser at the time of delivery to the carrier, as it would pass if it were not for such C.O.D. direction? Or does it have the effect simply of making the carrier the agent of the seller to collect the price, with directions to retain possession until paid? It seems to me that the latter is the true doctrine. I know of no better presentation of the reasons in support of it than is contained in the opinion of Judge Barbour in the case of Commonwealth vs. Russell, 11 Ky. L. R. 576. He there said:

"When the terms of sale are agreed on and the bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties without actual payment or delivery, and the property and the risk of accident to the goods is to the buyer. He is entitled to the goods on payment of the price, and not otherwise, when nothing is said at the sale as to the time of delivery or time of payment. The payment or tender of the price is in such cases a condition precedent, implied in the contract of the sale, and the buyer can not take the goods or sue for them without payment; for though the vendee acquired a right of property by the contract of sale, he does not acquire a right of possession of the goods until he pays or tenders the price, 2 Kent, 492. The rule thus laid down by Kent is undoubtedly the law in this state, whatever dissent to it may have been expressed by the courts of some other states, Crawford vs. Smith, 7 Dana, 60; Sweeney vs. Owsley, 14 B. M. 332; Duncan vs. Lewis, 1 Duv. 184.

"Where goods of a certain character are ordered, and the buyer directs that they be sent by a common carrier, or, when by course of trade, delivery to a common carrier to be sent to the buyer is the evident intent, in such cases property passes as soon as the goods are put in the carrier's possession. From this rule of law has resulted the general proposition that when the goods are consigned, the consignee is presumed to be the owner in the absence of proof to the contrary. Benjamin on Sales, Corbin's ed., sec. 517. It is well settled that the delivery of goods to a common carrier, a fortiori to one specially designated by the purchaser, for conveyance to him, or to a place designated by him, constitutes an actual receipt by the purchaser. In such cases the carrier is in contemplation of law the bailee of the person to whom the goods are sent, the latter in employing the carrier being considered as an agent of the former for that purpose. Ib. sec. 181. It seems to us clear, upon the authority cited, that the sale in question was made at Maysville.

"If, after the whiskey had been delivered to the carrier, it had been destroyed by an act of God, the loss would have fallen on Ryan. It had been delivered to the agent whom he had selected to carry it to him, and after that delivery the

vendor could not have retaken it, except for the purpose of securing himself in the event of the purchaser's insolvency. Nor could he have sold it to another person. An action for the carrier's failure to deliver it would have been in Ryan. This could only be so upon the hypothesis that he was the owner.

"If Ryan had requested the appellee to sell him a gallon of whiskey and to set it apart and retain it for him until a future day, when he could call and pay for it, upon appellee's acceptance of the proposition and the setting apart of the whiskey Ryan would become the owner of it, and if it should be destroyed without appellee's fault before the time when it was to be called and paid for, the loss would be Ryan's. What is the distinction in principle between the supposed case and the one we are considering? We can conceive of none. Ryan becomes the owner when his proposition to buy was accepted and the whiskey was delivered to the express company, the agent whom he had selected to bring it to him. If the appellee had sent the whiskey to be delivered to Ryan unconditionally, upon learning that he was insolvent the appellee could have arrested the whiskey in the hands of the carrier, at any time before it was actually delivered, and could have thus secured his price. The understanding between the parties that it was to be delivered only upon payment of the price was but a more certain mode of securing the vendor. It gave to him the right secured to him by the law in the absence of such agreement.

"The fact that the price was to be paid to the carrier before he was authorized to deliver to the purchaser, no more affects the question as to when and where the sale was made than if the goods had been sent without such directions, and the seller had relied upon some other mode of collecting the price. The sale is in either case absolute. The only difference is that in one case a lien is retained, and in the other it is not. In each case the carrier is the purchaser's agent, for the purpose of carrying, and the seller's agent, where the price is to be paid before delivery, for the purpose of collecting the money."

To the same effect are the cases of Commonwealth vs. Fleming, 130 Pa. St. 138; State vs. Carl, 43 Ark. 353; Pil-

green vs. State, 71 Ala. 368; Norfolk So. R. Co. vs. Barnes, 104 N. C. 25; State vs. Peters, 91 Me. 31; State vs. Flannagan, 38 W. Va. 53; James vs. Com. 102 Ky. 108; Breehwald vs. People, 21 Ill. App. 213:

The cases of State vs. O'Neil, 58 Vt. 140; U. S. vs. Shriver, 23 Fed. 134; U. S. vs. Kline, 26 Fed. 515; State vs. Wingfield, 115 Mo. 428; Crabb vs. State, 88 Ga. 353, are contra.

The case of U. S. vs. Chevalier, 107 Fed. 434, so far as the point decided is concerned is not contra. The most that can be said is that a favorable reference is made in the opinion to the doctrine of the last named cases, though that is not entirely certain.

It is true that some of those cases are decisions of federal courts, but they are in no wise binding upon me. I am free to decide the question according to correct principle and weight of authority.

In view of the holding that the sales complained of were made in Covington, where the defendant had a license to sell it, it is unnecessary to determine the other question as to whether, if they had been made in Johnson county, such sales would have amounted to carrying on the business of a retail liquor dealer in Johnson county. The indictment is dismissed.

A. M. J. Cochran, Judge.

Oct. 20, 1902.